

IN THE COURT OF COMMON PLEAS
OF THE COUNTY OF LEBANON,
Pennsylvania

SCOTT WAYNE ELYSTONE,

Petitioner.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

**On Writ Of Certiorari To The
Supreme Court Of Pennsylvania**

LIST OF RESPONDENT

**EDWARD D. PRISON, JR.
Attorney General of Pennsylvania**

**RONALD B. BROWN
Special Deputy Attorney General;
Chief, Appeals Unit, Philadelphia
Deputy Attorney's Office**

**MICHAEL J. BURKE, JR.
Special Deputy Attorney General;
Assistant District Attorney,
Philadelphia County**

**BRIAN D. NIMCOMBE
Special Deputy Attorney General;
Assistant District Attorney,
Pittsburgh County**

**CARLA McLAUGHLIN BARTHOLOME
Special Deputy Attorney General;
Deputy District Attorney,
Philadelphia County**

**RONALD A. GALT
Chief Deputy Attorney General;
Appeals and Legal
Services Section**

***Counsel of Record**

**Office of the Attorney
General of Pennsylvania
1600 Shadeland Square
Henderson, PA 17120
(717) 787-3371**

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QUESTION PRESENTED

Is Pennsylvania's capital sentencing scheme - which explicitly permits the jury to return a verdict of life imprisonment based on any evidence of the defendant's character or record or the circumstances of the offense - unconstitutionally "mandatory" because the jury's conclusion that no mitigating circumstances exist results in a sentence of death?

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STATEMENT OF THE CASE

Petitioner was convicted of first degree murder by a Pennsylvania jury for robbing a hitchhiker of \$13 and then shooting the man six times in the back of the head because he believed the victim might be able to identify him. Later petitioner described the murder as "thrilling." The Commonwealth presented one aggravating circumstance under Pennsylvania's capital sentencing statute; petitioner, after a detailed colloquy, declined to present any evidence of mitigation; and the jury returned a verdict of death. Following an unsuccessful direct appeal to the Pennsylvania Supreme Court, this Court granted certiorari.

The crime occurred late on a Friday night, September 9, 1983, in Fayette County, southwestern Pennsylvania. Petitioner was out with his girlfriend, Jackie Guthrie, his friend, George Powell, and Powell's companion, Barbara Clarke (R. 2A, 1B-2B, 101).¹ Petitioner, driving the car in which the four were riding, and armed with a .22 caliber revolver he had stolen from a former place of employment, determined that he needed money and that he

¹ The trial testimony, presented on June 11, 12 and 13, 1984, is contained in a single volume not included in the Joint Appendix, and designated here as "R." The testimony of two trial witnesses, although appearing in the volume at the appropriate chronological point, was typed immediately for use in other proceedings, and is numbered separately from the pagination for the remainder of the volume. Barbara Clarke's testimony is numbered as 1A-22A and appears between pages 31 and 32 of the regular pagination. Jackie Guthrie's testimony is numbered as 1B-32B and appears between pages 57 and 58 of the regular pagination.

would get it through robbery (R. 34-35, 5B-6B, 15B-18B, 102). Petitioner soon identified a target, twenty-four-year-old Dalton Smithburger. Dalton, a special education student, had been at a tavern, where the bartender had given him some beer and two dollars because he "thought maybe he needed a sandwich or something" (R. 4-5, 27). Dalton then walked to a Pizza Hut, bought a Pepsi, and started hitchhiking home (R. 5-7, 5A-6A, 5B, 102).

Petitioner stopped the car, while George Powell, in the back seat, hid his girlfriend's face under a coat. Dalton asked petitioner to take him home. Once in the front seat, the victim asked if anyone wanted a drink of his beer. Petitioner instead wanted to know how much money Dalton was carrying (J.A. 119; R. 3A, 6A, 3B, 6B, 27B, 102). When the victim replied that he had only a few dollars, petitioner put the gun to his head and repeatedly ordered him to keep his eyes closed or petitioner would blow his brains out. Jackie, petitioner's girlfriend, twice asked petitioner not to do it (J.A. 119-20; R. 6A-8A, 7B-8B, 28B-29B, 102-03). The frightened victim, however, was unable to resist the temptation to look up. Angered by this disobedience, petitioner pulled over and directed Powell to watch the boy while petitioner came around the car. Petitioner then told Powell to accompany him, but Powell stalled (J.A. 120-21; R. 8A-10A, 7B-9B, 103, 117).

By himself, then, petitioner took the victim into a field at gunpoint, searched him, and ordered him to lie face down. Returning to the car, petitioner told his cohorts that he planned to kill the victim because of the possibility of identification. Jackie shrugged her shoulders; Powell said that the victim would not be able to identify his girlfriend and him, and that petitioner could

do whatever he wanted (J.A. 120-22, 136; R. 9A-10A, 8B-10B, 12B, 103-05, 117).

Petitioner went to the victim, sat on his back, and asked him if he could describe petitioner's car. The victim replied: "all I know is it was green and the back end was wrecked." The description was accurate. Petitioner said "goodbye," felt the victim's whole body go rigid in fear, and shot him six times in the back of the head (J.A. 122, 129; R. 10A-11A, 10B, 12B, 104-05, 111).

Jackie started the engine to leave without petitioner. Before she could get away, however, petitioner returned and pushed her out of the driver's seat. Petitioner said "[i]t was thrilling." He then took his friends to a dark stretch of road, where he told them he would kill them all if they revealed what he had done (R. 10B-11B).

Two hours later, the group returned to the murder scene. Petitioner had remembered that he touched the victim's cigarette pack while searching him and feared fingerprints might have been left. This time, after petitioner disparaged him for remaining behind earlier, Powell went with petitioner to the body. Petitioner retrieved the pack from under the corpse, then smoked the bloodied cigarettes (J.A. 123-25; R. 12A-14A, 12B-13B, 105-08).

The body was discovered the next morning (R. 11). Two beer bottles and a cup from Pizza Hut were alongside (R. 16-17). Autopsy revealed six separate gunshot wounds to the back of the head and through the brain (R. 21-23).

A week after the murder, petitioner held a gun to his girlfriend's head, threatened to put her "out there" with Dalton Smithburger, and clicked the trigger six times (R. 31B-32B). He also told her that, if she were questioned about the crime, she must take the blame for him (R. 19B).

Petitioner's threats constrained his associates from reporting the crime to authorities (R. 12A, 11B). Some months later, however, George Powell let slip word of the incident to a mutual friend, Miles Miller (R. 85-86). Miller went to the state police, who placed a small tape recorder on Miller's person before a meeting with petitioner (R. 65-70, 87-90).

During the conversation, on December 15, 1983, petitioner discussed the murder in detail. Petitioner revealed his intent to rob and kill someone. Even before picking out a victim, he had decided, "fuck it - I'm going to just drive up and blow somebody's brains out and take their wallet" (J.A. 119; R. 101). When he came across Dalton Smithburger, "I knew what I was going to do. I told everyone what I was going to do . . . They thought I was bull-shitting" (J.A. 119-20; R. 102).

As the crime progressed, petitioner told Miller, he was pleasantly surprised that the victim made no escape attempt. After ordering Dalton to lie down and returning to the car, "I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-fucker ain't going to lay there, but I wanted to warn them - you know, Jackie and George - I wanted to warn them that I was going to waste him." When he went back to the field and found the victim as he had left him, "I had to laugh" (J.A. 129; R. 111).

Petitioner then described the actual shooting: "I fucking wasted him. Blood spattered all over me . . . You should have heard it, man - pow, pow, pow, pow, pow, pow. Brains started oozing out of this fuck. Every hole I would put in his head, brains would start oozing out each time I shot him" (J.A. 122; R. 105).

At the same time, petitioner demonstrated sophisticated knowledge of crime detection techniques and how he believed he had thwarted them. He told Miller that there would be no fingernail scrapings for police to find, that there were too many footprints at the scene for a match to be made, and that the only object he could have left fingerprints on was the cigarette pack, which he retrieved (J.A. 123; R. 105-06). He discoursed on firearms ballistics, explaining that, although most people didn't know it, bullets could be matched not only to characteristic marks inside the gun barrel, but also to the firing pin and, in the case of automatics, the firing chamber (J.A. 137-39; R. 118-20). (Police eventually located the gun linked to this murder: it was a revolver, not an automatic; the barrel was missing; and the firing pin had been filed down (R. 37-39, 43, 50-51, 14B-18B, 81-82)).

In light of these precautions, petitioner told Miller, "I knew the only way I could get caught is if somebody talked, but nobody's going to talk 'cause I'm going to kill them too." Petitioner was confident of silence for the additional reason that George Powell "is an accessory to murder. He went back there and touched the body with me, and Jackie's an accessory" as well (J.A. 131; R. 112-13). Now, said petitioner, "[w]hen I tell him that I'll kill him, it don't mean I'm going to 'beat you up or hurt you; it means I'm going to kill you,' and Jackie looks at

me different, you know" (J.A. 132; R. 114). "You just did it to prove it to them?" Miller asked. "No," said petitioner, "it was necessary. The guy could identify us, you know." But "[i]t proved a point at the same time" (J.A. 133; R. 115).

To the date of the conversation with Miller, petitioner's efforts at escaping apprehension had succeeded. "[N]othing ever happened," petitioner said. "Nobody ever came to us . . . [I]t's an unsolved murder . . . What I am trying to tell you man, is – it's easy. It's fucking easy, you know." "To kill somebody?" Miller asked. Petitioner replied: "To get away with it" (J.A. 128; R. 110). He later continued: "If you know what you are doing, man, you can get away with anything, including murder. It ain't hard at all" (J.A. 130; R. 112). "You can walk up and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self confidence" (J.A. 133; R. 114).

Petitioner declared his intent to employ the same strategy in future crimes: "That's why I don't want to fuck around anymore. If I think that motherfucker is going to identify me, or his being alive is going to help me get caught or if I ain't going to have time to get away or something, I'm going to kill him . . . The next job I am thinking about doing . . . I am ready to do the job which would help me get my house, my apartment, have enough money for Christmas" (J.A. 137; R. 118).

Christmas was just ten days later. On December 16th, however, petitioner was arrested. Although facing a first degree murder charge and possible death sentence, petitioner, against counsel's advice, declined to engage in

plea negotiations because he believed he could get the taped conversation suppressed, and because a conviction would constitute a violation of petitioner's parole on other offenses and result in a return to prison for those crimes. Accordingly, the case came to trial in June, 1984. Petitioner's suppression motion was denied, but he chose to proceed to trial in order to preserve his appellate claims (R. 4/12/85, 58-59).²

At trial, both Jackie Guthrie, defendant's girlfriend (R. 1B-32B), and Barbara Clarke, Powell's girlfriend (R. 1A-22A), testified in detail to the events of that night. The Commonwealth also presented evidence that petitioner had stolen a .22 caliber revolver two months before the murder, that he sold the weapon the month after the murder, and that the slugs recovered from the victim were consistent with having been fired from a weapon of this type (R. 37-39, 43, 50-51, 14B-18B, 81-83). Finally, the Commonwealth played the tape of petitioner's own recounting of the crime (J.A. 118-39; R. 101-20).³ After a

² See, e.g., Commonwealth v. Myers, 481 Pa. 217, 392 A.2d 685 (1978) (under Pennsylvania law, guilty plea waives all appellate issues except jurisdiction of court, legality of sentence, and validity of plea).

The record reference is to an evidentiary hearing held before the trial court on April 12, 1985, concerning petitioner's motion for a new trial.

³ The trial court did not allow the jury to hear the complete tape recording, excising portions concerning sexual relationships and petitioner's statements that he had committed as many as seven other murders (R. 97-98). The complete tape was, however, made part of the record.

colloquy with the court, petitioner personally stated that he did not wish to testify or present witnesses (R. 122-24). The jury found him guilty of murder in the first degree, robbery, and conspiracy on June 13, 1984 (R. 138-39).

The case immediately proceeded to a capital sentencing hearing before the same jury. The Commonwealth offered one aggravating circumstance in support of a death penalty, that the murder occurred during the perpetration of a felony. 42 Pa. Cons. Stat. Ann. § 9711(d)(6). The Commonwealth did not offer any new evidence to establish this circumstance, but relied on the trial record (J.A. 9; R. 146).

Petitioner indicated that he did not wish to present evidence of mitigating circumstances. Petitioner's counsel stated his advice, in lengthy discussions with petitioner, that petitioner testify and call his parents as witnesses. The trial court cautioned petitioner that the jury could find the aggravating circumstance presented if it concluded that the homicide occurred during perpetration of the robbery; that petitioner had the right to present "whatever evidence you wish in mitigation of sentence," either as to any of the specific statutory examples of mitigating circumstances or as to any other matter concerning petitioner's character or record or the circumstances of the offense; but that, if the jury chose on the basis of the evidence before it to find the one aggravating circumstance and no mitigating circumstances, it would be required under Pennsylvania law to return a sentence of death. The court urged petitioner to think carefully, warning him that his decision would be absolutely final, and that he would not later be able to challenge his

sentence on the ground that no mitigating evidence had been presented. After consulting again with counsel, petitioner maintained his decision not to present evidence (J.A. 3-8; R. 140-45).

The court then charged the jury in accordance with the Pennsylvania capital sentencing statute and the explanation previously given to petitioner (J.A. 11-16; 147-53). Petitioner's trial counsel perceived no inadequacies in the court's guidance on the sentencing process. After deliberating briefly, the jury returned and asked the court to repeat its instructions on mitigating circumstances. The court did so, going through each of the specific circumstances outlined in the statute, as well as the statutory catchall provision allowing consideration of any other mitigating matter derived from the evidence concerning the petitioner's character or record or the circumstances of this offense. One juror then asked for further comment on this last provision. The court responded that it gave the jury "great latitude" in deciding what it might draw from the record to consider as a mitigating circumstance. The court explained that, if the jury found any mitigating circumstances, it would have to weigh whatever it found mitigating against the aggravating circumstance in order to determine the sentence. Again, petitioner's counsel found the instructions sufficient. The jury indicated it was satisfied with the court's response and returned to deliberate further (J.A. 16-18; R. 153-55). Later that day it reached a verdict of death (J.A. 18-20; R. 155-57).

Petitioner subsequently filed post-verdict motions seeking relief on 41 grounds (J.A. 27-33). Trial counsel, for the first time, raised the claim that the Pennsylvania sentencing statute was facially unconstitutional because

of its allegedly "mandatory" feature. New counsel was appointed during the post-verdict proceedings. Although petitioner raised various claims of ineffective assistance of trial counsel, he acknowledged that the decision not to present any additional evidence at the sentencing hearing had been his alone (R. 4/12/85, 23). The trial court denied post-verdict motions, and formally imposed sentence on April 17, 1986 (J.A. 93).

Pursuant to Pennsylvania's capital sentencing statute, petitioner had an automatic direct appeal to the highest state court, the Pennsylvania Supreme Court. That court heard argument in March, 1987, and reargument in March, 1988, solely on the issue of the suppressibility, under the state constitution, of the tape recording of petitioner's account of the crime. On October 17, 1988, the court affirmed the judgment of sentence (J.A. 149). The court rejected the issue raised here, that Pennsylvania's capital sentencing statute is unconstitutionally mandatory, by relying on *Commonwealth v. Peterkin*, 511 Pa. 299, 327-328, 513 A.2d 373, 387-388 (1986), cert. denied, 479 U.S. 1070 (1987) (J.A. 113). There, the court stated:

Although it is true that the Pennsylvania death penalty statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, the statute permits the defendant to introduce a broad range of mitigating evidence that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstances found by the jury. Appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of mitigating circumstances

The Pennsylvania statute clearly permits consideration of such evidence. Specifically, Section 9711(e)(8) permits the introduction of "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). Thus, we find no merit to appellant's constitutional challenges to the Pennsylvania death penalty statute [footnotes omitted].

This Court granted certiorari on March 27, 1989 (J.A. 150). Petitioner retained new counsel, who filed petitioner's brief on the merits, to which the Commonwealth now responds.

SUMMARY OF ARGUMENT

This Court's precedent leaves no room for the assertion that a capital sentencing statute is unconstitutional "mandatory" merely because a death sentence results when the jury has had full opportunity to consider, but has declined to find, even a single mitigating circumstance. Such a statute appropriately implements the requirement that the law channel the jury's discretion, while guaranteeing individualized sentencing, so that the sentencer may rationally distinguish those it feels deserve the penalty from those it feels do not. In accordance with these principles, the Pennsylvania death penalty procedure does not create a mandatory penalty, but allows any fact the sentencer may deem to be mitigating to circumvent the imposition of a death verdict despite the presence of aggravating circumstances. The jury need not have unbridled discretion at every stage in the sentencing process in order to give effect to mitigation. Nor may

petitioner escape this conclusion by changing the focus of his argument from the facial validity of the allegedly "mandatory" provision (the basis of his certiorari petition) to the operation of other aspects of the sentencing process (the bulk of the discussion in his brief).

There is no constitutional requirement that the sentencer be directed to "weigh" the aggravating circumstances independently and in a vacuum where it has found that no mitigating circumstances exist. The weight to be attached to aggravating circumstances arising from the defendant's record or his offense is simply another way of describing whether any mitigating circumstances exist in the defendant's character and the nature of his crime. Individualized sentencing is thus fully afforded by the consideration of relevant mitigating evidence. Any conclusions arising from the proposed independent weighing of an aggravating circumstance may be expressed as a mitigating circumstance under the Pennsylvania statute. The additional step urged by petitioner is constitutionally superfluous.

The Pennsylvania statutory provision on mitigating circumstances, stating seven examples followed by a general "catchall" definition, and the jury instructions conforming to the statutory language, do not preclude consideration of mitigating facts which fall short of the quantitative standards supposedly set forth in the examples. The jury need satisfy only itself that the evidence qualifies as one of the enumerated examples; no external tests prevent it from considering whether evidence should be deemed a mitigating circumstance. Moreover, the plain wording of the statute's catchall provision, as well as the instruction given the jury here, indicated that

any fact relevant to the circumstances of the crime or the character and history of petitioner could be considered in mitigation. Petitioner's view, that a reasonable juror could misconstrue the statute's examples as somehow negating the catchall definition which followed, is unrealistic and strained. Further, a state is entitled, through such descriptive examples, to suggest to the sentencer the nature and quality of the concept of mitigation. Any narrowing which resulted from this guidance was within the state's power. The capital sentencing process must permit the jury to make a reasoned moral judgment based on the evidence, but it need not invite the jury to act on insubstantial feeling alone.

The statistics in petitioner's Appendix C do not remotely demonstrate jury nullification in cases implicating the Pennsylvania statute's so-called "mandatory" feature. This is because petitioner has enormously misstated the data on Pennsylvania death cases compiled by the Administrative Office of Pennsylvania Courts (AOPC). Petitioner affirms that the cases he lists involved a jury finding of one aggravating circumstance and no mitigating circumstances, so that a death sentence should have resulted. In fact, the life sentence entries on petitioner's list represent, for the most part, cases where one aggravating circumstance was *presented* (argued or supported by evidence) at sentencing, but where the jury did not conclude that the circumstance was *proven*, thus requiring a sentence of life. This is confirmed by the official forms submitted by Pennsylvania trial courts in all first degree murder cases, from which the AOPC data are generated. The AOPC maintains these forms on file,

and photocopies of forms for the life sentence cases mentioned in petitioner's appendix are included in a lodging to Section D of this brief. The forms show one aggravating circumstance presented, none found. Since Pennsylvania explicitly requires a life sentence in such cases, it is hardly surprising that the juries returned life sentences. Petitioner's data indicate, if anything, that the Pennsylvania law is functioning properly. The statute, and the verdict in this case, do not offend the Constitution.

ARGUMENT

THE PENNSYLVANIA CAPITAL SENTENCING PROCEDURE ASSURES INDIVIDUALIZED SENTENCING THROUGH FULL CONSIDERATION OF RELEVANT MITIGATING EVIDENCE, CONSISTENT WITH THIS COURT'S PRECEDENT AND THE EIGHTH AMENDMENT.

A. The Pennsylvania sentencing procedure does not impose a mandatory death sentence.

The question on which this Court granted certiorari is whether the Pennsylvania capital punishment statute mandates a sentence of death by operation of law, without allowing for consideration of factors which warrant a reduced punishment. Although petitioner's brief on the merits attempts to shift ground away from this question, it remains the primary issue before the Court, and must be decided in the state's favor. Pennsylvania grants the sentencing jury full authority to find a mitigating circumstance from any evidence concerning the defendant's character or record or the circumstances of his offense, and to fix the sentence at life based on that finding. The

penalty is not "mandatory" merely because the jury may instead choose to find that no mitigating circumstances exist. Yet there must be some point, after full individualized consideration, at which the state may genuinely limit the capital sentencing process, or *Furman*'s mandate to reduce the arbitrariness in imposition of the death penalty loses force.

The Pennsylvania statute comports completely with the principles governing capital sentencing procedures which this Court has laid out since *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court held that the unfettered discretion normally exercised in sentencing could not be employed in capital cases, but must instead be replaced by systems narrowing the standards for death eligibility and discouraging arbitrary application of those standards. In *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, the Court held that constitutional capital sentencing schemes must not only narrow the class, but also provide for full consideration of individual differences within the class. In *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality), and subsequent cases, the Court held that this individualized consideration must consist of examination of the defendant's character and record and the circumstances of the offense.

Throughout this period, the Court has treated as unconstitutionally "mandatory" those statutes which automatically resulted in death upon conviction for a particular offense, without any examination of the individual defendant. In *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality), the statute in question provided an automatic death penalty for a first degree murder conviction. The plurality found this scheme an unacceptable

departure from societal standards because it allowed no individualized consideration of mitigating evidence. *Accord Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality). Similarly, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court invalidated a statute providing for a mandatory death sentence for a killing by a life prisoner because it permitted no consideration of mitigating circumstances.⁴

On the other hand, the Court has never condemned as mandatory a statute which, like Pennsylvania's, requires a death sentence only after the jury has completed its determination of aggravating and mitigating factors. *See Jurek v. Texas*, 428 U.S. 262, 269 (1976) ("yes" answer to each special question results in death sentence; see concurring opinion at 278: death penalty "must" be imposed under certain findings);⁵ *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (White, J., Burger, C.J., and Rehnquist, J., now Chief Justice, concurring) (sentencing judge "required" to impose death where aggravating factors outweigh mitigating factors); *see Baldwin v. Alabama*, 472 U.S. 372 (1985) (allegedly mandatory nature of sentencing statute irrelevant where sentencer actually had full

⁴ The dissenting opinion in *Woodson* observed that, no matter how serious the crime, requiring particularized consideration rules out a "mandatory" death sentence for that crime. 428 U.S. at 321. This view is borne out by the *Sumner* decision. Indeed, if any mitigating factor may result in a sentence of life imprisonment, no statute which gives effect to such factors can be considered to impose a "mandatory" death penalty.

⁵ In *Jurek*, a majority of the Court (Stewart, J., Powell, J., Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., now Chief Justice, concurring) apparently accepted this so-called "mandatory feature" as a valid accommodation to Eighth Amendment concerns in the Texas statute.

discretion to give effect to mitigating circumstances). What is an unacceptable "mandatory" provision under the Eighth Amendment must be measured through the statute's guidance of sentencing discretion and its provision for individualized sentencing consideration through mitigating factors. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (individualized sentencing must be afforded by unrestricted consideration of relevant mitigating evidence). It is a failure to meet these concerns, rather than syntax in the imperative, which renders a statute unconstitutionally mandatory.⁶

⁶ Of thirty-seven states with a death penalty provision, fourteen (including Pennsylvania) require imposition of a verdict of death in the event that aggravating factors (or their equivalent) are unmitigated. Those courts which have reviewed these statutes have, with one exception, held that such a formulation does not render the death verdict mandatory, since any mitigating circumstance may preclude a capital sentence:

ARIZONA, Ariz. Rev. Stat. Ann. § 13-703; *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984), cert. denied, 471 U.S. 1094 (1985); *State v. Gillies*, 142 Ariz. 564, 691 P.2d 655 (1984), cert. denied, 470 U.S. 1059 (1985); *State v. Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983); *see Adamson v. Ricketts*, 753 F.2d 441 (9th Cir. 1985), *reh'g en banc*, *rev'd on other grounds*, 779 F.2d 722 (9th Cir. 1986), *rev'd*, 483 U.S. 1 (1987); *contra Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), petition for cert. filed, 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553); CALIFORNIA, Cal. Penal Code § 190.3; *People v. McClain*, 46 Cal. 3d 97, 757 P.2d 569, 249 Cal. Rptr. 630 (1988), cert. denied, 109 S. Ct. 1356 (1989); CONNECTICUT, Conn. Gen. Stat. § 53A-46A; IDAHO, Idaho Code § 19-2515; ILLINOIS, Ill. Ann. Stat. ch. 38 § 9-1; *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984), cert. denied, 471 U.S. 1044 (1985); *People v. Jones*, 94 Ill. 2d 275,

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A description of the Pennsylvania statutory scheme substantiates the point. Pennsylvania confines the death penalty to cases of first degree murder, defined as murder "by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. Cons. Stat. Ann. § 2502(a), (d); 18 Pa. Cons. Stat. Ann. § 1102(a). Felony murder is defined as second degree murder and carries a mandatory sentence of life imprisonment. *Id.* § 2502(b); § 1102(b).

Immediately after a first degree murder conviction, a penalty hearing is held before the jury which decided guilt. Sentencing is performed by the jury unless a jury is waived by the defendant, in which case the process is carried out by the trial judge. 42 Pa. Cons. Stat. Ann.

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447 N.E.2d 161 (1982), cert. denied, 464 U.S. 920 (1983); MARYLAND, Md. Ann. Code art. 27 § 413; *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), cert. denied, 478 U.S. 1010 (1986); MONTANA, Mont. Code Ann. § 46-18-301 to 310; *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979), cert. denied, 446 U.S. 970 (1980); NEW JERSEY, N.J. Stat. Ann. § 2C:11-3; *State v. Price*, 195 N.J. Super. 285, 478 A.2d 1249 (1984); OHIO, Ohio Rev. Code Ann. § 2929.03(D)(2), (3); *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), cert. denied, 472 U.S. 1032 (1985); OREGON, Or. Rev. Stat. § 163.150; PENNSYLVANIA, 42 Pa. Cons. Stat. Ann. § 9711; *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), cert. denied, 479 U.S. 1070 (1987); TENNESSEE, Tenn. Code Ann. § 39-2-203; *State v. Bell*, 745 S.W.2d 858 (Tenn. 1988); *Houston v. State*, 593 S.W.2d 267 (Tenn. 1979), cert. denied, 449 U.S. 891 (1980); TEXAS, Tex. Code Crim. Proc., art. 37.071; *Johnson v. State*, 691 S.W.2d 619 (Tex. Crim. App. 1984), cert. denied, 474 U.S. 865 (1985); WASHINGTON, Wash. Rev. Code §§ 10.95.060 to 080; *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 109 S. Ct. 380 (1988).

§ 9711(a), (b), App. 1. The jury's decision is not merely a recommendation, but actually fixes the sentence. § 9711(f), (g), App. 5.

The class of death-eligible murderers is further narrowed by an exclusive list of specific aggravating circumstances which must be proven beyond a reasonable doubt at the penalty hearing. All relevant mitigating evidence is considered in determining whether any mitigating circumstances exist by a preponderance of the evidence. Seven non-exclusive statutory examples of mitigating factors are given, followed by a "catchall" general provision. § 9711(d), (e), App. 2-4.

If the sentencer unanimously finds one or more aggravating circumstances and no mitigating circumstances, or one or more aggravating circumstances which outweigh any mitigating circumstances, the sentence "must" be death. In all other cases, the sentence "must" be imprisonment for life. § 9711(c), App. 2. A death sentence is automatically appealed to the Supreme Court of Pennsylvania, which reviews claims of error, conducts a proportionality review, and independently determines whether the penalty was the product of "passion, prejudice or any other arbitrary factor." § 9711(h), App. 5-6; *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970 (1983).

This procedural structure does not improperly mandate a death penalty. Although guidance is provided throughout the sentencing procedure, the end result is that the jury may always choose life over death by deciding that one or more mitigating circumstances exist, and that any aggravating circumstances do not outweigh the mitigating circumstances. *Commonwealth v. Peterkin*; *Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986), cert.

denied, 483 U.S. 1010 (1987); Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1144 (1985) (plurality). By using the word "must" in the last stage of the interlocked process, Pennsylvania encourages the jury to determine any mitigating circumstances, and weigh them against any aggravating circumstances, most carefully. If the state may not constitutionally undertake even this minimal level of oversight, as petitioner maintains, if it must allow complete discretion even after aggravation has been found and mitigation rejected, then the concern which caused the massive revision of death penalty laws almost two decades ago - the elimination of arbitrariness - has been turned on its head. The Eighth Amendment should not be interpreted to require gut level sentencing. The Pennsylvania system well balances the competing concerns of fair capital procedures.⁷

⁷ Apparently recognizing that the question presented in his certiorari petition provides little hope for success, petitioner shifts focus in his brief on the merits. He now urges that his sentencing process was unconstitutional not because of its "mandatory feature" in itself, but because it failed to provide explicitly for consideration of (1) evidence which purportedly affects the "weight" of aggravating circumstances, but yet does not qualify as a mitigating circumstance, and (2) evidence which is too weak in "degree" to meet quantitative restrictions purportedly contained in the statute's specified mitigating circumstances, but which still justifies a life verdict. These contentions are addressed in detail in Sections B and C below. Two general points must be made here.

First, although petitioner calls his argument an "as applied" challenge to his sentence, it is in large part a facial attack on the constitutionality of the Pennsylvania statute. All rulings and instructions to the sentencing jury here were in

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B. The Pennsylvania statute permits full consideration of factors affecting the "weight" of the aggravating circumstances.

Petitioner argues that his death sentence must be vacated because capital sentencers should be required to evaluate the "weight" of aggravating circumstances at a separate and additional stage from their consideration of

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complete accord with the statute, and petitioner does not claim otherwise. Thus, petitioner's position necessarily rests on the premise that the language of the statute is unconstitutionally confining. Moreover, to the extent that petitioner really does make an "as applied" argument based on the insufficiency of the instructions in his case as opposed to the words of the statute, such a claim is outside the bounds of his certiorari petition, which explicitly challenged the statute on its face.

Second, although petitioner contends that the argued limitations on "weight" of aggravation and "degree" of mitigation result from the statute's "mandatory" feature, it is far from clear how this is so. If there truly is such a thing as "weight" of aggravation which must be considered independently from mitigating circumstances, then elimination of the "mandatory" provision of the statute will not solve the problem. Changing the word "must" to "may" will still leave the jury ignorant of this supposedly crucial step in the sentencing process. The same is true as to foreclosing jury consideration of lesser "degrees" of mitigation. Absent the provision that the verdict must be death upon a finding of one aggravating and no mitigating circumstances, the jury will still believe (assuming petitioner's argument is accepted) that its consideration of mitigating evidence is limited. Thus, it appears that petitioner's real complaint is with the statute's definitions of aggravating and mitigating circumstances, not with its "mandatory" sentencing aspect. The claimed constitutional infirmity on which this Court granted review does not exist.

mitigating circumstances. In fact, Pennsylvania's process of determining mitigating circumstances permits consideration of the very factors which petitioner labels as going to the weight of the aggravating circumstances. He received what the Constitution requires.

Capital penalty proceedings must achieve two results: eliminating arbitrariness and ensuring individualized consideration. Within these broad principles, power is reserved to the states to legislate appropriate procedures. Thus, the real question is not how many "stages" or what labels the Pennsylvania statute provides, but whether it channels sentencer discretion while addressing the particulars of the defendant and his crime. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

Petitioner sidesteps this central issue, instead focusing on the proposition that some murders in the course of a felony - the only aggravating circumstance presented here - are not as bad as others.⁸ It is clear, however, that Pennsylvania procedure gives the jury ample opportunity

⁸ Petitioner goes so far as to suggest that some murders which fall within this aggravating circumstance cannot constitutionally be punished by death at all. Brief for Petitioner at 18. The suggestion is unfounded. In order to be sentenced to death in Pennsylvania for a killing in the course of a felony, the defendant must first have been convicted of first degree murder, which requires a specific intent to kill. *Commonwealth v. Holcomb*, 508 Pa. 425, 466-468, 498 A.2d 833, 854-855 (1985) (plurality), cert. denied, 475 U.S. 1150 (1986) (distinguishing felony murder, which is second degree murder under Pennsylvania law, punishable by life imprisonment, from first degree murder aggravated by carrying out the killing during course of felony, punishable by life or death). The Constitution plainly permits the death penalty in such cases. *Exumund v. Florida*, 458 U.S. 782 (1982).

to give effect to any such concerns in the course of considering mitigating factors. The statute, mirroring this Court's language in *Lockett v. Ohio* and cases since, directs the jury to consider any evidence concerning the defendant's character and record *and the circumstances of the offense*. This last phrase plainly permits the jury to evaluate factors affecting the seriousness of the killing in the course of a felony: the violence or non-violence of the underlying felony (the only such factor identified in petitioner's brief), the defendant's degree of participation in the felonious conduct, the spontaneity of the actual murder, and any others. Indeed, it is difficult to imagine what else the highlighted words could mean.⁹

Significantly, petitioner does not even attempt to argue this issue with reference to this dispositive language of the statutory catchall mitigating circumstances provision. Instead, he maintains that his sentence is invalid because his jury, which was charged consistently with the language in the statute, was not specifically

⁹ All the other aggravating circumstances listed in the Pennsylvania statute can also be categorized as reflecting either on the character and record of the defendant or on the circumstances of his offense. Subsections 9711(d)(1) (killing of fireman or law enforcement officer), (d)(2) (murder for pay), (d)(3) (kidnapping or hostage killing), (d)(4) (killing during airplane hijacking), (d)(5) (killing of prosecution witness), (d)(7) (creation of grave risk of death to others), and (d)(8) (killing by torture) all relate to the circumstances of the offense. Subsections 9711(d)(9) (history of violent criminal conduct), (d)(10) (prior conviction of life- or death-punishable offense), (d)(11) (prior murder conviction), and (d)(12) (prior manslaughter conviction) all relate to the defendant's character or record. App. 3-4.

instructed that it could convert consideration of the weight of the aggravating circumstance into consideration of mitigating circumstances. The point is semantic, not substantive. It is true that the jury was not told to interchange the labels in question. It was told, however, explicitly and repeatedly, that it must consider the circumstances of the offense in deciding if any mitigation existed. It was further informed that "aggravating and mitigating circumstances are circumstances concerning the killing and the killer which makes [sic] a first degree murder case either more serious or less serious" (J.A. 9; R. 145). These instructions, like the statutory language itself, surely granted the jury power to give effect to any concern it had about the seriousness of this killing in the course of a felony; petitioner simply rejected the chance, despite full knowledge of the consequences, to present his own version of events. The failure was petitioner's, not the statute's.¹⁰

¹⁰ Any suggestion that the fault here lay with the instructions as opposed to the statute must be rejected for several additional reasons as well. As noted above, such an as-applied claim is outside the scope of petitioner's certiorari petition, which asserted that the statute was unconstitutional on its face. Furthermore, petitioner's trial attorney, who raised the facial attack after the trial, made no objection that the instructions, as distinct from the statute, were insufficient to allow the jury to consider weight of aggravation. See *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985) (counsel's failure to seek clarification of allegedly ambiguous remarks could be considered in assessing defendant's present interpretation of comments at issue). Most important, as discussed in text below, the bulk of petitioner's argument in this section of his brief is that weight of aggravation and mitigation are, by definition, mutually exclusive.

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Petitioner nonetheless insists that weight of aggravating factors cannot be considered in the context of determining mitigation. The two processes, he asserts, represent fundamentally different concepts: evaluating the weight of the aggravating circumstances means deciding whether the criminal and the crime were "sufficiently evil," whereas evaluating mitigating factors means deciding whether there was "some sort of extenuation" (Brief for Petitioner at 20). Petitioner treats his distinction as self-evident; in fact, it is non-existent. Aggravation and mitigation are simply opposite ends of

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Under this approach, a charge that weight of aggravation should be considered in determining mitigation would, in petitioner's words, "twist[] the very concept of mitigation into unrecognizability" (Brief for Petitioner at 20). Necessarily, then, petitioner's real complaint is not that the trial court's instructions on mitigation should have been more specific, but that the statutory fabric itself, by not explicitly providing for the independent consideration of the "weight" of aggravating circumstances, precluded such consideration.

Petitioner argues that the jury's request for reinstruction on mitigating circumstances indicated its desire to impose a life sentence and its frustration that the statute would not allow it to do so. No such conclusion is possible on this record. The jurors made their request, heard the court's response, indicated their satisfaction with the reinstructions – which had emphasized the jury's great latitude to vote for life by deriving any mitigating circumstances from the record – and then agreed that they could find no mitigating circumstances, and that the sentence should be death. The fact that conscientious jurors wished to make sure they understood the law before imposing the ultimate sentence is hardly evidence that they actually wanted to return the opposite verdict.

the same spectrum of conduct.¹¹ The essential point is that the sentencer examine that spectrum in the light of the defendant's character and the circumstances of his offense. That is what this Court has held, what Pennsylvania law requires, and what petitioner's jury was told. Whether the inquiry is undertaken under the label "aggravating circumstances" or "mitigating circumstances" is constitutionally irrelevant.

Thus, the operation of the Pennsylvania sentencing procedure provides no basis for requiring a separate stage to consider the "weight" of aggravating circumstances. Petitioner's primary authority for such a requirement is this Court's precedent in *Sumner v. Shuman* (invalidating statute imposing death for murder by life prisoner) and *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding death sentence based on both statutory and non-statutory aggravating circumstances). In *Sumner*, however, the Court commented on the weight of aggravating circumstances only in rejecting a statute which did not allow for any consideration of the individual circumstances of the defendant or the offense. The Court held that such consideration must occur in some manner during the sentencing process, but by no means indicated that it must occur separately from determination of mitigating circumstances.¹² In *Barclay*, the concurring

¹¹ Webster's International Dictionary, Second Edition, defines "aggravate" as "to make worse or more severe." It defines "mitigate" as "to make or become less severe," and lists as an antonym the word "aggravate."

¹² Indeed, the *Sumner* Court observed:

Beginning with *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a plurality of the Court recognized

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opinion simply observed that Florida apparently does permit the sentencer to consider the "weight" of aggravating circumstances even after mitigating circumstances have been determined and balanced against aggravating circumstances. 463 U.S. at 964. But there is no suggestion in any of this Court's opinions that this extra dimension of standardless discretion is constitutionally mandated. On the contrary, the cases make clear that the states are free to take a variety of procedural paths toward the goals of channeling discretion while individualizing the sentencing process.¹³

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that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.*, at 604, 98 S.Ct. at 2965 (emphasis in original). In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), a majority of the Court accepted the *Lockett* plurality's approach.

483 U.S. at 75-76. Obviously, the Court did not contemplate that full consideration of mitigating circumstances was somehow inadequate to address the factors relevant to the "weight" of aggravating circumstances.

¹³ *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) (no "one right way" to order capital sentencing procedure in federal system); *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984) ("To endorse [a] statute as a whole is not to say that anything different is unacceptable); see, e.g., *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (upholding statute which, unlike most states, performed reviewing function at guilt phase through specific definition of capital murder, while allowing consideration of mitigating

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Petitioner's assertion that his sentence was invalid because his jury was not permitted to fully consider the weight of the aggravating circumstance is particularly unconvincing given the facts of this case. This was no petty theft which turned into murder in a moment's panic. Rather, it is precisely the kind of crime which demonstrates why murder in the course of a felony is an aggravating circumstance. Petitioner set forth to commit a robbery by blowing someone's brains out; selected an unsuspecting, tractable victim; determined to kill the victim to avoid identification; gleefully shot him six times in the head; boasted of the ease with which he could get away with such crimes; and vowed to murder his future victims whenever it would be of any use. Petitioner has never - in the trial court, in the state appellate court, or in this Court - identified any particular factor which could have reduced the weight of this aggravating circumstance yet escaped consideration in the context of mitigating circumstances. It is obvious that, given the overwhelming evidence, including petitioner's own detailed statement describing his murderous intent, any attempt to do so would have been rejected by the jury. The circumstances of petitioner's offense were not mitigating. His

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factors at sentencing phase); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding statute which, unlike most states, contained no provision for consideration of mitigating circumstances, as long as jury was permitted to do so in answering special questions at sentencing phase); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding statute which provided for consideration, but no balancing, of lists of aggravating and mitigating circumstances).

displeasure with the jury's understandable assessment of his crime and his character does not establish a constitutional violation.

C. The Pennsylvania statute permits full consideration of facts affecting both enumerated and unenumerated mitigating circumstances.

Petitioner next contends that Pennsylvania's capital sentencing provision governing consideration of mitigating factors, and the jury instructions given in accordance with this provision in this case, are unconstitutionally limiting. This claim is based on the fact that several of the enumerated factors listed as examples in the statute contain descriptive adjectives - e.g., "extreme" emotional disturbance, "substantially" impaired capacity - which purportedly preclude the jury from considering lesser "degrees" of mitigation. As before, however, petitioner disregards the substance of the statute in an effort to create gaps in the sentencing process where none exist. The reality is that Pennsylvania allows the jury to give effect to any degree of mitigation, either as enumerated or unenumerated factors.

The Pennsylvania statute acts to fully advise the jury of the nature and character of mitigating circumstances by providing specific examples followed by a general and all-inclusive definition. This informs, not limits, the jury's discretion, such that, while subjective mitigating factors may be given effect, considerations which are arbitrary or irrational are disfavored. The statute thus provides an appropriate "vehicle" for a "reasoned moral response" specific to the case and the defendant. *Franklin v. Lynaugh*,

108 S. Ct. 2320, 2333 (1988) (O'Connor, J., with Blackmun, J., concurring). By emphasizing to the jury that it has great latitude in deciding what may constitute a mitigating factor, and giving examples in illustration, the Pennsylvania statute increases the likelihood that such factors will be found.

Contrary to petitioner's claim, the adjectives contained in the enumerated mitigating circumstances permit the jury to find these specific factors whenever it wishes to include them in the ultimate sentencing determination. Petitioner's position is that, if the statute speaks, for example, of "substantial" impairment of capacity, then there must be some level of impairment between "zero" impairment and "substantial" impairment which the jury cannot consider.¹⁴ In fact, it is the jury which has the power to determine what is "substantial" – or "significant," or "extreme," or "relatively

¹⁴ The subsections containing such modifiers are as follows:

- (1) The defendant has no significant history of prior criminal convictions.
- (2) The defendant was under the influence of extreme mental or emotional disturbance.
- (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. §309 (relating to duress), or acted under the substantial domination of another person.
- (7) The defendant's participation in the homicidal act was relatively minor.

§ 9711(e), App. 4.

"minor" – and what is not. The jury will inevitably and appropriately make this determination in light of whether it believes the evidence in question has mitigating effect. If, for example, the jury feels the defendant to be less culpable because of evidence of intoxication, then it can find that the intoxication caused "substantial" impairment. Indeed, it is difficult to imagine, and petitioner does not suggest, any other manner in which the determination could be made. The legislative choice to include descriptive language to help guide the exercise of sentencer discretion simply does not straiten the jury's ability to return a life verdict.¹⁵

In any event, even if the specific factors listed in the statute limited consideration of any mitigating evidence, the statute's general provision would allow the jury to give effect to such evidence. Subsection (e)(8) of the sentencing law gives the jury the broadest possible power to find a mitigating circumstance in "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense [emphasis added]." Petitioner argues that the jury will nonetheless disregard this open-ended language. It will think to itself,

¹⁵ This Court has recognized the absence of constraints in similar descriptive words when they have appeared in aggravating rather than mitigating circumstances. Indeed, the Court in that context held such language unconstitutional because it was not sufficiently limiting. *Godfrey v. Georgia*, 446 U.S. 420 (1980) (offense "outrageously or wantonly vile, horrible and inhuman"); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (offense "especially heinous, atrocious, or cruel"; use of modifiers such as "outrageously" or "especially" does not restrict jury's discretion). While this flexibility of language works against the capital defendant in an aggravating circumstance, it benefits him in a mitigating circumstance.

he asserts, that the enumerated circumstances are intended to be the exclusive method of considering any evidence which falls within the categories they define, and that the words "any other evidence" in (e)(8) really mean "any other categories of evidence." Thus, petitioner declares, the jury will conclude that any evidence not measuring up to the quantitative standards purportedly embedded in the enumerated factors cannot be considered at all. Petitioner's speculation, however, flatly ignores the words of subsection (e)(8). There is no reason to believe the jury will do the same. *See California v. Brown*, 479 U.S. 538 (1987) (Court will not assume jurors ignored plain meaning of jury instruction in favor of defendant's strained, abstract interpretation).

Petitioner seems to assume that mitigating evidence must always be characterized as falling within a category corresponding to an enumerated circumstance, and therefore subject to its purported limitations of degree. In fact, a defendant is never required to present a particular piece of evidence – such as intoxication – in the nomenclature of a particular enumerated circumstance. For example, petitioner pigeonholes his alleged intoxication under (e)(2) (extreme emotional disturbance) and (e)(3) (substantial impairment of capacity to conform to legal requirements). Had he truly wished to urge this evidence on the jury, however – which he clearly did not – he could have done so in some other guise – for example, that it blunted the intensity of his specific intent to kill – or with no labels at all.¹⁶ Similarly, petitioner labors to classify

¹⁶ Of course, there was no evidence in the record that petitioner actually was intoxicated, or even that he had

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under subsection (e)(5) (defendant acted under substantial domination of another person) evidence allegedly indicating that he was "ambivalent" about the murder. This ambivalence is supposedly revealed by the fact that he secured the concurrence of his cohorts before he killed the victim.¹⁷ As above, however, there was no need to present such evidence under the ill-fitting (e)(5). He could have made his point at least as effectively without that gloss. If a Pennsylvania defendant fears that his mitigating evidence will lose its force under the purported restraints of the enumerated circumstances, he is under no obligation to subject himself to them. The

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anything to drink. The trial testimony showed only that he bought a bottle of alcohol at some point that evening (R. 24B). Petitioner declined to shed any further light on the issue at the sentencing stage.

¹⁷ The record explodes the notion that petitioner approached his friends because of any doubts he had about pulling the trigger. Petitioner stated clearly that he had decided to kill the victim well before he ordered Dalton out of the car, but that his friends did not believe he would (J.A. 119-20; R. 101-02). His girlfriend begged him not to do it, and George Powell would not even leave the back seat (J.A. 120-21; R. 8B, 28B-29B, 103). Petitioner then returned, in his own words, to "warn" his associates, not to get their permission (J.A. 129; R. 111). They in fact displayed only the most grudging acquiescence (R. 10A, 10B). Petitioner later said that he killed the victim both because it was "necessary" to prevent identification, and to prove a point to his companions (J.A. 133; R. 115). After the murder, he threatened to kill them all if they informed on him; he was confident they would not, in part because he had made them accessories to his crime (J.A. 131; R. 10B-11B, 112-13). This is hardly evidence of an ambivalent amateur who needs his friends' support to complete the act.

statute's catchall provision allows him to present his evidence on his own terms.¹⁸

Finally, even if petitioner's strained parsing of the Pennsylvania statute had revealed any actual bound on

¹⁸ To the extent that petitioner's claim here, like his argument on aggravating circumstances, is intended as an as-applied challenge to the jury instructions in this case rather than a facial attack on the Pennsylvania statute, it must fail. As previously discussed, such a contention, made for the first time in petitioner's brief here, is outside the scope of the certiorari petition; in addition, trial counsel gave no indication that he interpreted the court's instructions as in any way limiting the jury's consideration of mitigating evidence.

As in his argument on aggravating circumstances, petitioner asserts that the jury's request for reinstruction on the catchall mitigating circumstance is significant. Because the court did not respond by specifically telling the jurors to consider "degrees" of mitigation which were "insufficient" under the seven enumerated factors, petitioner contends that the jury did not know it could do so under the eighth, general provision. As before, however, the claim is a chimera. Since the court never imposed any quantitative limits on the jury's consideration of the enumerated factors, and since the jury was told that there were no limits on the kinds of evidence it could consider as an unenumerated factor under (e)(8), the Court simply cannot assume that the jury would have come upon the academic interpretation of the law which petitioner belatedly posits. Compare *Penry v. Lynaugh*, 57 U.S.L.W. 4958 (1989) (where sentencing statute, unlike Pennsylvania's, did not on its face allow jury to find mitigation in defendant's character or record or circumstances of offense, and language of statute may have led jury to believe it could not consider defendant's mental retardation as mitigating factor, specific instruction on mental retardation was necessary).

his ability to argue mitigation, there would be no constitutional violation. The Eighth Amendment does not command the states to indulge every possible theory of mitigation which a capital defendant may devise. Petitioner's "degree of mitigation" claim is reminiscent of the "residual doubt" concept which this Court rejected in *Franklin v. Lynaugh*, 108 S. Ct. at 2327 (plurality opinion); *id.* at 2334-35 (concurring opinion). There the defendant contended that the sentencing jury should have been allowed to consider any residual doubts about his guilt which may have remained in the jurors' minds after convicting him. Here petitioner contends that the jury may have retained some lingering doubt about whether a particular fact amounted to a mitigating circumstance. This Court, however, has never imposed a requirement of absolute certainty on every step in the thought process resulting in a death verdict.

Nor has the Court mandated that capital sentencing must be structured to permit jurors to return a life verdict on inarticulable whim, free-floating emotion, or a shapeless sense of sympathy or mercy undefined by the evidence. *California v. Brown*, 479 U.S. at 542; *id.* at 545 (concurring opinion).¹⁹ The decisions the jury must make are to be reasoned moral judgments, not more emotional

¹⁹ Compare Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 Duq. L. Rev. 103, 156-57 (1982), taking the position that statutory specification of either mitigating or aggravating factors improperly restricts the jury's discretion to deliver a life verdict, and advocating the deconstruction of all such standards: "the principle of reliability in death penalty sentencing . . . requires that a sentencer be permitted to return a life sentence for any reason, or no reason," *id.* at 106. This article provides the blueprint for much of the argument in petitioner's brief.

reactions. *Penry v. Lynaugh*, 57 U.S.L.W. 4958, 4962, 4964 (1989). It is true that such emotions are unavoidable in matters as awesome as life and death. The question, however, is whether the state may ask the jury to test such incipient gut reactions against objective criteria. If an initial notion is not sufficiently strong for the juror to fit it, in his own judgment, into any one of the enumerated or unenumerated mitigating circumstances, then the sentencing scheme appropriately puts that notion aside. Pennsylvania's treatment of mitigating circumstances properly seeks rationality in this fashion. The Constitution should not be read to forbid the effort.

D. Statistics on Pennsylvania death penalty cases, which petitioner has grossly misrepresented, show no pattern of jury nullification to avoid the "mandatory" feature of the Pennsylvania statute.

In a last attempt to cast doubt on his sentencing process, petitioner refers to a computer printout from the Pennsylvania Death Penalty Study, a computerized data base of first degree murder cases maintained by the Administrative Office of Pennsylvania Courts (AOPC). See *Commonwealth v. Maxwell*, 505 Pa. 152, 169, 477 A.2d 1309, 1318, cert. denied, 469 U.S. 971 (1984). Petitioner claims that Pennsylvania juries engage in "nullification" by routinely returning life verdicts in cases where they have unanimously found one aggravating and no mitigating circumstance. This would be in direct disregard of the Pennsylvania statute, which requires a sentence of death in such cases. Specifically, petitioner relies on a list of thirty-six life sentence cases in which, he alleges, there

was a finding of one aggravating circumstance and no mitigating circumstances (Brief for Petitioner at 29; Appendix C at 10a-11a). These verdicts, he declares, prove that Pennsylvania juries are uncomfortable with the "mandatory" feature of the sentencing statute and ignore it at will to achieve a just result.

Petitioner has completely misstated the AOPC data. In fact, virtually all of the thirty-six cases on which petitioner's argument is based were cases where the Commonwealth *presented* one aggravating circumstance, but the jury declined to *find* it. In such cases, the Pennsylvania statute requires a verdict of *life*. The true nature of petitioner's statistics is revealed by the actual AOPC reporting forms filed in petitioner's cases, and by duplication of the computer search which resulted in petitioner's list. Copies of the relevant materials, as well as a detailed explication of the AOPC study, have been separately filed with the Court as a Lodging to Section D of Respondent's Brief. These materials leave no doubt that the AOPC data stand for exactly the opposite of the proposition for which petitioner presents them.

The Pennsylvania Supreme Court has directed the AOPC, its administrative arm, to collect data to assist the court in the statutory proportionality review undertaken in all death penalty appeals. The AOPC study is a computerized store of facts received through a standardized form ("Review Form, Murder of the First Degree") which is sent to the trial judge in each first degree murder case. The judge's responses to the twenty-two questions on the review form are entered in the data base of the AOPC study. The questions seek information such as the age and race of the defendant and victim, the date of the crime

and sentence, and the number and nature of the aggravating and mitigating circumstances involved. Members of the public may retrieve particular data, either in an individual case or across a range of cases, by request to the AOPC. For example, one could obtain a printout of all cases in which twenty-year-old male victims were murdered by males born in 1960, or a printout of all cases in 1986 in which the Commonwealth argued the aggravating circumstance of murder during a hijacking. A sample AOPC review form is contained in the Lodging to Section D of Respondent's Brief at 1L-7L.

For purposes of this case, the relevant questions on the AOPC form are Questions 12 and 13. Both list all of the statutory aggravating circumstances. Question 12, however, asks the trial judge to check off those aggravating circumstances which were "presented at the sentencing hearing by the Commonwealth," while Question 13 asks the trial judge to check off those aggravating circumstances which the sentencer "actually found to have been proven by the Commonwealth beyond [a] reasonable doubt." Petitioner's data is based on Question 12 (aggravating circumstances presented) rather than 13 (aggravating circumstances proven).

Examination of the actual AOPC forms and other court documents for the cases in petitioner's appendix demonstrates his error. In thirty-three of the thirty-six cases, each form clearly shows one line checked under Question 12 – that is, one aggravating circumstance presented at the sentencing hearing by the Commonwealth. Each of these forms also shows no lines checked under Question 13 – that is, no aggravating circumstance actually found to have been proven by the

Commonwealth.²⁰ In the thirty-fourth case, the absence of a finding of any aggravating circumstances is established by the official verdict sheet returned by the jury.²¹ The remaining two life sentence cases on petitioner's list were not jury verdicts at all: In one, the jury sentenced the defendant to death, but the trial judge subsequently vacated the death sentence.²² In the other, the jury deadlocked, which, under the Pennsylvania sentencing statute, § 9711(c)(1)(v), automatically results in the entry of a life sentence by the trial judge.²³ Thus, the documents demonstrate that none of the cases on petitioner's list resulted in a life sentence despite a finding of one aggravating and no mitigating circumstances. The data do not establish a single instance of jury nullification.

²⁰ The first three pages of each of the 33 forms are found at pages 13L-36L, 40L-72L, 77L-118L of the Commonwealth's Lodging. Question 12 appears on page 2 of each form, and Question 13 appears on page 3 of each form.

²¹ *Commonwealth v. Melson* (cited as "Nelson" on petitioner's list). The AOPC form in *Melson* does show one line checked off under Question 13. This was apparently in error, however, since the verdict sheet filled out by the jury itself does not show that any aggravating circumstances were found. The verdict sheet and AOPC form appear in the Commonwealth's Lodging at 73L-76L.

²² *Commonwealth v. Graves*. The AOPC form in *Graves* appears in the Commonwealth's Lodging at 37L-39L. The case's procedural history is also detailed in a reported appellate opinion, 310 Pa. Super. 184, 456 A.2d 561 (1985).

²³ *Commonwealth v. Barron*. The AOPC form for this case, at 10L-12L in the Commonwealth's Lodging, shows one line checked off under Question 13, aggravating circumstances found. The form does not indicate, however, whether the jury reached a decision on mitigating circumstances before it deadlocked. As a result, it cannot be ascertained whether this is a case to which the "mandatory" feature of the statute applied.

The same result is made apparent by a duplication of the AOPC computer search which generated the list of cases in petitioner's Appendix C. This duplication can be accomplished only by a search for all cases in which the total number of aggravating circumstances *presented* was one, and the total number of mitigating circumstances presented was zero. A computer printout resulting from such a search appears in the Commonwealth's Lodging at 8L.²⁴ It matches petitioner's list exactly, with the exception of the addition of new cases added to the AOPC's data base since the time of petitioner's request for information. This printout demonstrates that petitioner's list does not represent cases in which one aggravating circumstance was actually found, and so does not indicate any jury nullification.²⁵

Indeed, even if petitioner's data had truly represented cases where an aggravating circumstance was found, they would not have supported his nullification

²⁴ The precise search made is indicated by the computer codes appearing in the printout's caption. The codes used here are "V122" and "V125." A key to these codes appears at the end of the printed AOPC form (Lodging at 7L). "V122" is listed in the key as "Total Aggravating Presented at Sentencing," corresponding to Question 12 on the form. "V125" is listed in the key as "Total Mitigating Presented at Sentencing," corresponding to Question 16. The designation in the caption of "V122 EQ 1" means total aggravating circumstances presented equal to one. The designation in the caption of "V125 EQ 0" means total mitigating circumstances presented equal to zero.

²⁵ A second computer printout also appears in the Commonwealth's Lodging, at 9L. This printout is based on Question 22(1), which asks whether a sentence of death was based

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claim, for there is a second flaw in his analysis. Petitioner's data do not reflect findings as to mitigating circumstances. The only question on the AOPC form concerning mitigating circumstances is Question 16, which asks only for mitigating circumstances "presented at the sentencing hearing by the defendant."²⁶ As in petitioner's own case, however, the jury is free to find mitigation arising from the trial record even if the defendant has not presented evidence at the sentencing hearing or argued any specific mitigating circumstances. Thus, the juries in petitioner's cases may well have found mitigation, and returned life verdicts because they found the aggravating circumstances not to outweigh the mitigating circumstances. There is simply no basis for concluding that the sentences were the result of "nullification" rather than the proper operation of the statute.²⁷

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on at least one aggravating and no mitigating circumstances, or on aggravating circumstances which outweigh mitigating circumstances. This is the only instance in which the AOPC is able to record an actual jury finding that no mitigating circumstances exist. Forty-three such cases, all death sentences, appear on this printout.

²⁶ There is no question for specifying mitigating circumstances found, since the sentencing statute does not require the jury to state what aggravating or mitigating circumstances it may have found in reaching a life verdict.

²⁷ In addition to presenting statistics purportedly showing that similarly situated Pennsylvania defendants have received life sentences, petitioner also attempts to diminish his deservingness of death by citing cases from other jurisdictions in which life sentences were returned (Brief for Petitioner,

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Finally, it does not follow that what petitioner views as nullification, even were it present, is of any constitutional significance in the present context. Nullification is

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Appendix B). The exercise is futile. It is hardly surprising that petitioner is able to handpick, from the whole of American jurisprudence, cases in which brutal facts can be highlighted, yet no death penalty was imposed. What is noteworthy is that the list is relatively short. It becomes even shorter when adjustment is made for the factual misrepresentations and omissions in petitioner's summaries of the cases.

In *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984), cert. denied, 470 U.S. 1009 (1985), for example, the crime was indeed terrible (the victim was raped and set on fire), but the jury sentenced the defendant to death, not life, as petitioner claims. In *State v. Serrone*, 95 N.J. 23, 468 A.2d 1050 (1983), the defendant killed a father and daughter, but could not be sentenced to death because New Jersey had no death penalty at the time. N.J. Stat. Ann. § 2C:49-1 et seq., L. 1983 c. 245 1-12, effective July 5, 1983. And in *Spaziano v. State*, 433 So. 2d 508 (Fla. 1983), aff'd, *Spaziano v. Florida*, 468 U.S. 447 (1984), and *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981), the juries returned advisory verdicts of life, but were not aware - unlike the judges who rejected the advisory verdicts and imposed death - that the defendants had violent felony records.

In other cases, the defendants presented significant mitigating evidence, unmentioned by petitioner in his summaries, thus changing the sentencing calculus greatly from that in petitioner's own case. E.g., *State v. Grilz*, 136 Ariz. 450, 666 P.2d 1059 (1983) (insanity claim); *People v. Brown*, 169 Cal. App. 3d 728, 215 Cal. Rptr. 465 (1985), cert. denied, 108 S. Ct. 717 (1988) (defendant under influence of PCP).

In numerous other cases in petitioner's appendix, the reported opinion simply does not discuss whether mitigating circumstances existed, making any comparison with petitioner's

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an irremovable power of juries; it may be eliminated only by eliminating the jury or by rendering its decision non-final or wholly advisory. See *Gregg v. Georgia*, 428 U.S. at 199 n.50. The practice of nullification was of concern in *Woodson v. North Carolina* because it was a vehicle for arbitrariness. The mandatory penalty in *Woodson* purported to eliminate arbitrariness by completely removing sentencing discretion. Instead, discretion in the form of nullification remained, without guidance, wholly arbitrary, but at the trial rather than the sentencing phase. The Pennsylvania statute, in contrast, actively guides the sentencer's discretion.

The Constitution demands guidance to reduce the risk of an arbitrary verdict; it does not demand a guarantee that arbitrary life verdicts will never result. Where discretion has been sufficiently guided before the alleged nullification takes place, a nullification argument becomes a *non sequitur*. Indeed, if the statute adequately guided the sentencer's discretion, an apparently arbitrary verdict cannot accurately be deemed a nullification.

In short, the Constitution guards against arbitrariness. It does not reject nullification as such, but rejects arbitrary nullification. Thus, notwithstanding his faulty analysis of the data, petitioner's nullification argument is superfluous. Since the statute here adequately guides sentencing discretion and gives effect to relevant mitigating evidence, the resulting verdicts cannot be deemed

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case impossible. E.g., *State v. Schrock*, 149 Ariz. 433, 719 P.2d 1049 (1986); *Hogan v. State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *State v. Kester*, 38 Wash. App. 590, 686 P.2d 1081 (1984).

arbitrary. The Pennsylvania capital sentencing statute satisfies the Eighth Amendment.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

ERNEST D. PREATE, JR.*
Attorney General of Pennsylvania

RONALD EISENBERG
Special Deputy Attorney General;
Chief, Appeals Unit, Philadelphia
District Attorney's Office

HUGH J. BURNS, JR.
Special Deputy Attorney General;
Assistant District Attorney,
Philadelphia County

EWING D. NEWCOMER
Special Deputy Attorney General;
Assistant District Attorney,
Fayette County

GAELE McLAUGHLIN BARTHOLD
Special Deputy Attorney General;
Deputy District Attorney,
Philadelphia County

ROBERT A. GRACI
Chief Deputy Attorney General;
Appeals and Legal Services Section

*Counsel of Record

Office of the Attorney
General of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

APPENDIX

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.-

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas. - If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury. -

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as

defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), committed either before or at the time of the offense at issue.

(e) **Mitigating circumstances.** – Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) **Sentencing verdict by the jury.** –

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) **Recording sentencing verdict.** – Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) **Review of death sentence.** –

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence or because the sentence of death is disproportionate to the penalty imposed in similar cases, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).
